IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 7TH FEBRUARY 2007 / 18TH MAGHA 1928

CRL.A.No. 158 of 1999(A)

AGAINST THE JUDGEMENT/ORDER IN CC.483/1995 OF THE 1ST CLASS MAGISTRATE COURT, CHAVAKKAD.

CRA.36/1997 of ADDL. SESSIONS COURT, THRISSUR.
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APPELLANT: COMPLAINANT

T.HAMEED, THIRUNILATHU HOUSE,
CHIYYANUR, KOKKUR P.O,
MALAPPURAM DISTRICT.

BY ADV. M/S.M.N.S.NAYAR & CO;

RESPONDENTS: ACCUSED & STATE
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1. **A.T.SHAHUL HAMEED,**
   S/O.HYDROSEKUTTY.P.M.,
   PUZHAKARA ILLATH HOUSE,
   THIRUVANKITOM, GURUVAYUR.

2. **STATE OF KERALA, REP.BY**
   THE PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.P.K.ASHOKAN
BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSHKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07/ 02 / 2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY, J.

Crl.Appeal No.158 OF 1999

Dated 7th February, 2007

JUDGMENT

Appellant/complainant filed a complaint before the Magistrate's Court contending that cheque dated 12.11.1993 issued by the first respondent was dishonoured as he issued stop memo illegally. According to the complainant, he used to sell duty paid foreign gold procured by his brothers Majeed and Alavi to the appellant and appellant issued the cheque in question for price of the gold. In the statement, it is also stated that the gold procured by his brothers were sold to the appellant for Rs.20,00,000/=. The appellant paid Rs.5,00,000/= in cash and issued two cheques. Accused denied the entire story. Appellate court in paragraph 12 of the judgment held as follows:

> "The point for consideration is whether the execution of the cheque is proved. Though, it is stated by the 2nd respondent as PW2 that Ext.P2 was issued in the mediation talk and agreement on 11.10.1993, there is not even a whisper of that either in the complaint or in the sworn statement. May be, such details are not required to be mentioned in the complaint or sworn statement. But, even Ext.P4, the o/c of notice issued to the appellant does not refer to any such mediation talk or settlement on 11.10.1993 or on any other day. It is also to be

remembered that inspite of the appellant denying in Ext.P6 the whole transaction the complaint does not make mention of the alleged mediation talk or settlement. The 2nd respondent, though filed a witness list along with the complaint, did not examine any witness even to prove the alleged mediation talk/settlement. According to PW2, he sold 5 Kg. Of gold biscuit for Rs.20,60,000/= to the appellant on 20.7.1993. He claimed that he got Rs.60,000/= then. But strangely he did not take any document/cheque from the appellant, then. It is difficult to think that PW2 sold gold worth Rs.20,60,000/= to the appellant, without even a scrap of paper to evidence that. The normal course would have been to obtain a cheque at that time. There is also no evidence worth the name to show that PW2 had been dealing in gold biscuits. He has no case that he had purchased the gold from his brothers Majeed and (or Alavi). Instead, what is stated that he `procured' it from them. He has never gone abroad. He would say that his brother Alavi brought the gold (said to be sold to the appellant on 20.7.1993) from abroad in the year 1992. Thee are documents to prove that. But, PW2 did not produce any such document. PW2 conceded that he did not have Rs.20,00,000/= either in cash or in his account in the bank, during 1993. It was suggested to him that he does not even have the financial capacity to invest Rs.20,00,000/= (for purchasing gold biscuits from his brothers). He answered that the gold was brought by his brother. If actually Alavi had brought such gold biscuits from abroad, there should have been documents – if it were lawfully brought, which alone could be presumed – as conceded by PW2. But such documents are also not produced. It is also difficult to think that it was the gold biscuits brought from abroad in 1992, that were sold to the appellant (by PW2)

> on 20.7.1993, and that too, without even a scrap of paper to evidence that."

Appellate court also noticed that in chief examination PW2 stated that the cheques were issued on 11.10.1993, but, in cross examination he stated that cheques were given on 13.10.1993. He also stated that another cheque for Rs.5,00,000/= was received by him. No action was taken against that cheque. Even though, according to him, the cheques were issued in mediation talk and settlement, he chose the cheque dated 12.11.1993 for encashment only on 4.5.1994 and the delay was also not explained. As if the cheque was issued in settlement of the matter, it would have been presented earlier. No evidence regarding settlement and mediation was also produced. According to the first respondent, he had handed over three cheques of Rs.5,00,000/= to the brother of PW2 who had agreed to go abroad and deliver gold biscuits. But, since he was caught by the customs and arrested under COFEPOSA, the gold biscuits were not given and, therefore, he issued stop memo and cheque was not issued for a legally enforceable debt. Even accepting the case of the complainant, the cheque was issued for illegal transaction and it was not proved that the cheque was issued for a legally enforceable debt. We agree with the finding of the appellate court

that cheque was not issued for a legally enforceable debt. In any event, view of the appellate court in acquitting the accused is a possible one and no interference is required. Since there is no merit in the appeal, the appeal is dismissed.

J.B.KOSHY
Judge

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